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Stella Faye Buckler v. Commonwealth of Kentucky

Appellee's Brief 1975-SC-0427

APPELLEE'S BRIEF

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541 SW2d 935

COURT OF APPEALS OF KENTUCKY

File No. 75-427

STELLA FAYE BUCKLER — APPELLANT

VS. APPEAL FROM JEFFERSON CIRCUIT COURT
CRIMINAL BRANCH, FIRST DIVISION
(The Honorable S. Rush Nicholson, Judge)

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLEE

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Copies of within Brief mailed, first-class postage prepaid, to the Honorable S. Rush Nicholson, Judge, Jefferson Circuit Court, Criminal Branch, First Division, Louisville, Kentucky 40202; the Honorable Edwin A. Schroering, Jr., Commonwealth's Attorney, Courthouse, Louisville, Kentucky 40202; and the Honorable Thomas E. Clay and the Honorable Paul G. Tobin, Office of the Jefferson District Public Defender, 1000 Republic Building, Louisville, Kentucky 40202, Counsel for Appellant, this the 4th day of August, 1975.

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MAY IT PLEASE THE COURT:

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

I. WHETHER THE APPELLANT'S MENTAL HOSPITAL RECORDS WERE PROPERLY EXCLUDED IN THE ABSENCE OF ANY SHOWING AS TO NECESSITY FOR THEIR ADMISSION WITHOUT AUTHENTICATION BY THE ATTENDING PHYSICIAN?

II. WHETHER EXAMINATION OF AN EXPERT IS LIMITED TO HYPOTHETICAL QUESTIONS WHEN HIS OPINION ON THE CRITICAL ISSUES IS BASED, IN PART, ON HEARSAY?

III. WHETHER THE TRIAL COURT WAS REQUIRED TO INSTRUCT THE JURY AS TO THE DISPOSITION OF THE APPELLANT SHOULD SHE BE FOUND NOT GUILTY BY REASON OF INSANITY?

IV. WHETHER REVERSIBLE ERROR WAS COMMITTED UNDER THE VIA V. COMMONWEALTH REQUIREMENT OF A MENTAL COMPETENCY HEARING?

V. WHETHER THE TRIAL COURT PROPERLY REFUSED INSTRUCTIONS ON REASONABLE DOUBT AS TO APPELLANT'S SANITY?

COUNTERSTATEMENT OF THE CASE

The Commonwealth accepts appellant's Statement of the Nature of the Proceedings. Facts relevant to each argument made by appellee will be separately stated therein.

ARGUMENT

I.

THE APPELLANT'S MENTAL HOSPITAL RECORDS WERE PROPERLY EXCLUDED IN THE ABSENCE OF ANY SHOWING AS TO NECESSITY FOR THEIR ADMISSION WITHOUT AUTHENTICATION BY THE ATTENDING PHYSICIAN.

In her first argument appellant contends that the trial court twice erred in excluding evidence pertaining to her sanity at the time of the crime. In the first instance she urges that the mental hospital records compiled subsequent to her son's murder were improperly refused because she subpoenaed the custodian who was willing and able to testify as to the contents of the same. The trial court refused to admit them because the defense had made no effort to secure the attendance of any of the doctors who

authored the hospital reports (TE, p. 98). Appellant contends that under the holdings of Whittaker v. Thornberry, 306 Ky. 830, 209 S.W.2d 498, 501 (1948); Payne v. Commonwealth, Ky., 509 S.W.2d 264, 266 (1974); and Bellew v. Commonwealth, Ky., 477 S.W.2d 779, 781 (1972), the records should have been admitted even though the attending physicians were not present to testify.

Appellee will initially acknowledge that the instant trial court record is replete with evidence of Mrs. Buckler's mental problems. Appellee is admittedly perplexed at the life sentence she was given, especially in view of the fact that the previous trial ended in a hung jury (TR, p. 12). However, we realize that the Commonwealth's responsibility under our adversary system is to present the strongest case possible to support a judgment of conviction. That there was no error under Kentucky law in the exclusion of the mental hospital records and that their effect, even if admitted, would have been no more than cumulative, cannot be gainsaid. It is, candidly, questionable whether in a case bearing strong earmarks of non-guilt by reason of insanity a defendant ought to be denied introduction of her complete medical history owing solely to retained trial counsel's failure to subpoena attending physicians rather than the custodian.

Stella Faye Buckler, a twenty-four-year-old newly wed housewife, had evidently had a normal upbringing and extensive education. She received her undergraduate degree in French from

Bresia College and undertook graduate studies at Indiana University (TE, pp. 103-104, 118). It was during her post-graduate work that she first manifested signs of illness, due to the pressure of school work (TE, p. 103). She then left school and took a department store job in Louisville at which she was evidently very happy (TE, p. 39). While working there she met Frank Buckler and was soon thereafter married. After suffering a miscarriage, she was given medication to get pregnant (TE, p. 106) and subsequently gave birth to Brian Christopher in June, 1973 (TE, p. 47).

Although Mrs. Buckler was, according to testimony given at trial, excited about the prospects of having a baby before delivery (TE, pp. 82, 106), she soon became disenchanted with everyday home life. She first went through a short period of being overly protective of the baby (TE, p. 83), of being an "unsure mother" according to her husband (TE, pp. 50, 51-52). The couple was having financial problems (TE, pp. 61, 90) and this early concern rapidly turned into an outright hostility toward the child because of the responsibility she had to assume in caring for him (TE, p. 107). Frank Buckler said he only saw his wife play with or cuddle the baby twice during this time (TE, pp. 54, 56). Her sister said Stella didn't talk about Brian much (TE, p. 83), although she communicated normally with everyone during this time (TE, p. 93). Finally, Stella said she didn't love the baby or her husband (TE, pp. 57, 84) and tried to leave their home, but her family interfered and brought her back (TE, p. 89).

Although appellant did not testify in her own behalf, the testimony at trial leaves no conclusion but that she one afternoon removed a slipcover from a plastic pillow (TE, p. 71) and held it over Brian's face until he smothered (TE, p. 27). She then telephoned her husband's place of employment and announced what she had done (TE, p. 29). Several persons from the store rushed home with Frank but the baby was dead (TE, pp. 30-31). After the crime Mrs. Buckler was quiet but her speech was coherent (TE, pp. 40, 42-43, 76, 93). In response to a question from her husband's boss as to why she had done it, she gave him a "straight answer." She said she just didn't want the baby anymore (TE, pp. 31, 36).

As the Commonwealth Attorney stated in closing, we are not here to try appellant's inclination to self-destruction (TE, p. 103). They jury had only to concern itself with whether the defendant was sane at the time of the crime within the criteria of Terry v. Commonwealth, Ky., 371 S.W.2d 862, 864-865 (1963):

> "The rule stated in section 4.01 of the Model Penal Code, approved by the American Law Institute in 1962, provides that the defendant has a defense if at the time he committed the act he did not have substantial capacity either to appreciate the criminality of his conduct, or if he did understand it to resist his impulse to violate the law. But, in either case, his conduct must have been the result of mental disease or defect. Mental disease or defect is defined as 'not including an abnormality manifested only by repeated criminal or otherwise anti-social conduct.' We believe this rule properly reflects the law."

Dr. Ehrman, who treated her before and after the murder and was the chief witness for the defense, said she was schizoid (TE, p. 113), not that she met the Terry test on August 17, 1973. He admitted that he was basing his opinion on an examination made on August 3, 1973 (TE, p. 119) and, what is more, conceded he had allowed her to return to the child despite the fact she was then allegedly threatening to smother him (TE, p. 109).

The trial court properly excluded the appellant's medical records inasmuch as there was insufficient necessity for their admission. The previously cited Kentucky decisions hold that medical records are admissible in evidence in a criminal case as part of the "shop book" exception to the hearsay rule when a proper foundation has been laid. Whittaker, supra, at 500-501. Appellee agrees that hospital records generally would fall within the exception. However, from the record it appears that a proper foundation was not laid since no necessity for admission without authentication by the author was shown. Bellew, supra, at 781; Whittaker, supra, at 501. It is true that appellant's trial counsel stated that Dr. Guerrero was unavailable to testify [Dr. Guerrero was, evidently, the person with chief responsibility for treating Mrs. Buckler] (TE, pp. 96-97). However, the trial judge noted that one of the other doctors who had treated Mrs. Buckler had not been subpoenaed by the appellant despite the fact that said doctor had an office in Louisville and had resided there for at least twenty-two years (TE, pp. 97-98).

The appellant suggests that it was unnecessary for any of the attending physicians to be present for testimony. She argues that the doctors were unlikely to be able to recall anything of importance beyond what the records show. In support she cites Bellew v. Commonwealth, Ky., 477 S.W.2d 779 (1972). But, in the instant case, we are not concerned with data along the lines of electrocardiograms, blood pressure, or x-rays; instead, we are concerned with professional opinions concerning the sanity of a young woman. While it is probable that a doctor will be unable to recall a patient's blood pressure for a given day, it is unlikely that a psychiatrist or psychologist who had worked frequently with a patient would be unable to recall in some detail their opinion (and the basis for that opinion) concerning that patient's mental condition. Further, the records in question contain numerous comments in technical jargon and it is doubtful if those records would be of much value to a jury unless the author were available to translate them. The Commonwealth submits that mental records would never fall within the shop book exception and furthermore that Whittaker precludes admission of any hospital records absent a showing of necessity.

Professor Chadbourn, in his recent revision of Professor Wigmore's treatise, has noted that virtually every exception to the hearsay rule rests on two principles: ". . . [1] a circumstantial probability of trustworthiness, and [2] a necessity, for the evidence . . ." 5 Wigmore, Evidence, §1420 (Chadbourn Rev. 1974). (Emphasis added.) The second principle, "necessity, for the evidence," requires that the person whose assertion is being

offered must be unavailable to testify or that "the assertion be such that we cannot expect . . . to get evidence of the same value from the same or other sources." Id., §1421.

> "The [necessity] principle is not always fully and consistently carried out in the rules; but the general notion is clear and unmistakeable, and it is acknowledged in these exceptions with more or less directness and strictness." Id. (Emphasis added.)

In the case sub judice, the appellant has failed to show the proper necessity for admitting her medical records and thus the records were properly excluded:

> "We conclude that an authenticated hospital chart is admissible in evidence where the party offering it shows the necessity of admitting the record without requiring the person or several persons who made it, or caused it to be made, to testify." (Emphasis added.) Whittaker, supra, at 501.

II.

EXAMINATION OF AN EXPERT IS LIMITED TO HYPOTHETICAL QUESTIONS WHEN HIS OPINION ON THE CRITICAL ISSUES IS BASED, IN PART, ON HEARSAY.

In the second portion of her first argument appellant contends that the court below erroneously refused to admit so much of a defense witness' opinion as was based on outside medical records. The court permitted only hypothetical questioning of psychiatrist James Bland once it became apparent that he could not vouch for the integrity of "what he had read" (TE, p. 124). The examination was thus properly limited (only the Commonwealth took advantage of this witness under this restriction) since Dr. Bland's opinion of appellant's mental condition was, in large measure, based on hearsay.

At the trial, Dr. James Bland, a psychiatrist, was called as an expert witness for the defense (TE, p. 121). He testified that his opinion as to the mental condition of Mrs. Buckler was based upon a number of sources other than personal observation and study (TE, p. 123). The trial judge then ruled that Dr. Bland was not qualified to testify as to his opinion of Mrs. Buckler's mental condition (TE, p. 124). The appellant argues that this ruling was improper.

The trial court's decision was founded upon the general rule that ". . . a physician's opinion based upon information supplied by third persons is not admissible. The same result obtains when the defendant's sanity is in issue." 3 Wharton's Criminal Evidence, §599, p. 157 (13th Ed. 1973). Apparently, this is the rule in Kentucky. Lewis v. Commonwealth, Ky., 332 S.W.2d 656, 659 (1960). However, this does not mean that the appellant was denied the opportunity to get Dr. Bland's testimony before the jury since he still could have been examined in the form of hypothetical questions based upon the previous expert's testimony. 2 Jones on Evidence, §§14.20, 14.21 (6th Ed. 1972).

The appellant also contends that she was prejudiced by an improper hypothetical question directed to and answered by Dr. Bland on cross-examination. There was no objection to either the question or the answer so this issue has not been preserved for appellate review. Berry v. Commonwealth, Ky., 495 S.W.2d 741 (1973). In any event, the hypothetical question was based upon facts in

evidence and thus was properly admitted. Hodge v. Commonwealth, Ky., 159 S.W.2d 422 (1942).

III.

THE TRIAL COURT WAS NOT REQUIRED TO INSTRUCT THE JURY AS TO THE DISPOSITION OF THE APPELLANT SHOULD SHE BE FOUND NOT GUILTY BY REASON OF INSANITY.

Under the law, as it presently exists in the Commonwealth, the trial court was under no duty to give the jury an instruction as to the disposition of the appellant if found not guilty by reason of insanity.

The appellant contends that since most jurors have no understanding of what happens to a defendant who is found not guilty by reason of insanity that an instruction should have been given explaining Mrs. Buckler's disposition in such an event. The implication of this argument is that if the jury had known that Mrs. Buckler might possibly be committed to a mental institution it would have been less reluctant to find her not guilty. This argument rests upon the unproven assumption that the average jury is unaware that a defendant who is found not guilty by reason of insanity is still subject to confinement by the court upon a finding that the defendant is in need of treatment. The appellant's contention is also based upon the unproven assumption that in some cases jurors will deliberately disobey the instructions of the court rather than find a defendant not guilty by reason of insanity out of fear that

such a defendant will be released. The Commonwealth does not believe that an instruction such as the one requested by the appellant would have been improper but neither is a failure to so instruct reversible error.

This Court, in its most recent pronouncement concerning instructions on the defense of insanity, makes no mention of an instruction of the type at issue here. See Terry v. Commonwealth, Ky., 371 S.W.2d 862, 865 (1963). Nor does Justice Palmore include such a requirement in his recent revision of Stanley's Instructions to Juries. See 1 Palmore, Kentucky Instructions to Juries, §10.31 (1975). The obvious implication of these facts is that such an instruction is not required.

IV.

REVERSIBLE ERROR WAS NOT COMMITTED UNDER THE VIA V. COMMONWEALTH REQUIREMENT OF A MENTAL COMPETENCY HEARING.

By way of a supplemental brief, appellant now additionally argues that the court erred in failing to conduct an RCr 8.06 hearing to determine her mental competency to stand trial. Relying on the recent decision of Via v. Commonwealth, Ky., 522 S.W.2d 848 (June 6, 1975), appellant argues that even if there are some facts in the record that "might warrant a finding of mental capacity [they] would not eliminate the necessity of a hearing." (at 850.)

Appellee submits that as in the case of Mullins v. Commonwealth, Ky., 454 S.W.2d 689, 690 (1970), and as reiterated in Via,

at 850, no hearing is required where ". . . the evidence of the existence of the capacity was so strong as not to leave a reasonable doubt of the capacity." The evidence in the record, including the supplemental record tendered by appellee this date, authorizes no conclusion by the trial court but that appellant was competent to assist in her own defense on February 25 and 26 of this year, when the case came to trial.

The record reveals that the trial date was postponed several times on motion of the Commonwealth from the time of appellant's indictment on November 7, 1973, until mid-1974 because she was under "psychiatric observation" at Central State Hospital (TR, p.3). At a mental inquest hearing at the hospital on November 28, 1973, the two psychiatrists who examined her said Mrs. Buckler displayed no psychotic manifestations (T. of M.I.H., pp. 5, 8) and initially said she could be released to jail (T. of M.I.H., p. 6). They said she could assume her normal role in society if released, but, after some discussion, did agree it would be best to keep her where she could get some treatment (T. of M.I.H., p. 10). An "indeterminate order" for her continued stay at Central State was accordingly entered by the court on November 30, 1973 (Supplemental Record).

Appellant herself made a motion for release on bond on June 10, 1974, stating that she had been given complete freedom of the grounds at the hospital and had been permitted to visit her husband (TR, pp. 4-5). Appended to the motion was an affidavit by

her hospital physician, Dr. Jack Davis, saying she could safely be released to her mother (TR, p. 8). Bond was set by the trial court on June 11, 1974 (TR, p. 10) and posted by appellant who was finally discharged from Central State Hospital that same date (Supplemental Record). Appellant remained free on bond (TR, pp. 12, 13) until found guilty on February 26, 1975 (TR, p. 16). If she returned to Central State Hospital for any further treatment after June 11, 1974, as the Commonwealth's December 6, 1974 motion to re-set indicates (TR, p. 12), it was solely at her own instance. The trial court gave Stella Faye Buckler, at the request of her retained counsel, the same freedom accorded any other criminal defendant awaiting trial who has posted the prescribed bond.

Unlike the petitioner in Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (February 19, 1975), who committed "episodic irrational acts" up until the trial itself (including a suicide attempt after testimony began) or the history of violent disturbed behavior of the defendant in Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966), the appellant in the instant case appears to have suffered only from recurring depression in the few years since her school days. All of the psychiatric evidence of record goes to establish her doubt in herself and pessimism toward the future, but does not support a contention that she at any time lacked ". . .the capacity to understand the nature and object of the proceedings against [her], to consult with counsel, and to assist in preparing [her] defense . . ."

Drope, supra, 420 U.S., at 171; 95 S.Ct., at 903; 43 L.Ed.2d, at 113. What is more, the staff at a state mental hospital felt her so adequate to face the rigors of day-to-day life that she was given an outright release months before trial. This Court said in Via, supra, at 849, that where ". . .the source of the information or the extent of competency found to exist" appears of record the trial court is not required to hold a competency hearing. Appellee submits that the opinions stated in the mental inquest hearing to the effect that Mrs. Buckler was able to function as "24 year old, white female Caucasion, married . . . in our society today" (T. of M.I.H., p. 10) coupled with her outright release from the hospital at her own request undeniably demonstrate her competency to stand trial. A previous suicide attempt and the murder of an infant are not inconclusively the results of a deranged mind. Since the only defense advanced was that of insanity at the time of the crime and since even the inadmissible records showed she freely admitted the killing, the Commonwealth asserts that appellant may not play "fast and loose" with the trial court by submitting psychiatric reports in support of her release on bond, then arguing on appeal that the court erred in failing to conduct a competency hearing before proceeding to trial.

V.

THE TRIAL COURT PROPERLY REFUSED INSTRUCTIONS ON REASONABLE DOUBT AS TO APPELLANT'S SANITY.

In the final argument in her supplemental brief, appellant contends there was reversible error in the trial court's failure to instruct the jury that the Commonwealth must prove appellant's sanity beyond a reasonable doubt. Paragraph number three of her tendered instructions reads as follows:

> "Sanity is a normal condition of man. Therefore, every man is presumed to be sane until the contrary is shown. So long as this presumption prevails, the prosecution is not required to prove the defendant's sanity. But as soon as some evidence of mental disorder is introduced, sanity, like every other fact, must be proved as part of the prosecution's case beyond a reasonable doubt."

Apparently, appellant acknowledges in her argument that this does not in fact represent the law of Kentucky pertaining to non-guilt by reason of insanity and, furthermore, that Supreme Court holdings do not dictate that such an instruction be given (Appellant's Supplemental Brief, pp. 3, 4).

However, she contends this would be a "better rule."

Just as in her previous allegation as to a defect in the jury instructions, the law of this state has mandated no requirements of this nature. The burden of proof on the issue of sanity has, in this jurisdiction, always been on the defendant. Henderson v. Commonwealth, Ky., 507 S.W.2d 454, 458 (1974). In Leland v. Oregon, 343 U.S. 790, 72 S.Ct. 1002, 9 L.Ed. 1302 (1952), which has never been overruled, the Supreme Court even went so far as to say that a state might permissibly require a defendant to prove his

insanity not merely by a preponderance of the evidence, but beyond a reasonable doubt. It is thus absurd to suggest that the Leland holding when read in conjunction with a case decided some fifty years earlier, Davis v. United States, 160 U.S. 469, 16 S.Ct. 353, 40 L.Ed. 499 (1895), requires jury instructions for the proposition that the state has the onus of proving sanity beyond a reasonable doubt. This argument is wholly without merit.

CONCLUSION

The jury instructions in this case comply with existing Kentucky law. Appellant's retained trial counsel failed to properly undertake to secure the admission of her mental hospital records because they did not attempt to secure the attendance of her attending physicians rather than the custodian. The exclusion of the records, which were no more than cumulative, was thus wholly authorized and not prejudicial to her substantial rights.

A psychiatrist's opinion on the ultimate issues is not admissible where based largely on hearsay. Similarly, appellant has made no case for reversal of her conviction on the lack of a competency hearing. Information of record, while confirming her frequent mental depressions, verifies her fitness and capacity for ordinary life.

Appellee respectfully urges that the judgment of the Jefferson Circuit Court be affirmed.

Respectfully submitted,

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